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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. CHARLES E. SINGLETON, Defendant and Appellant.	B288572 (Los Angeles County Super. Ct. No. BA458508)

APPEAL from a judgment of the Superior Court of Los Angeles County. Norman J. Shapiro, Judge. Affirmed and remanded with directions.

Carolyn D. Phillips, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Zee Rodriguez and Michael C. Keller, Deputy Attorneys General, for Plaintiff and Respondent.

Charles E. Singleton appeals the judgment entered following a jury trial in which he was convicted of one felony count of assault with a deadly weapon. (Pen. Code,[1] § 245, subd. (a)(1).) At sentencing the trial court denied a defense request to reduce the conviction from a felony to a misdemeanor under section 17, subdivision (b)(5). The trial court suspended imposition of sentence and placed appellant on felony probation for three years with specified conditions.

Appellant contends the trial court abused its discretion in refusing to reduce his felony conviction to a misdemeanor. We disagree, and affirm the judgment. Appellant further asserts and respondent agrees that the victim restitution and probation revocation fines (§§ 1202.4, subd. (b), 1202.44) must be stricken from the March 5, 2018 minute order because the trial court did not order any fines, fees, or assessments at the sentencing hearing. Appellant also contends that the court security and criminal conviction assessments (§ 1465.8, subd. (a)(1); Gov. Code, § 70373) must be stricken from the minute order because the trial court did not order these assessments and made no determination of appellant's ability to pay them. We agree and therefore remand the matter to the trial court with directions to correct the sentencing minute order to conform to the court's oral pronouncement of judgment.

FACTUAL BACKGROUND

On June 9, 2017, Saro Stephanian worked as an attendant for a self-parking garage. Around 8:30 p.m., Stephanian was in the parking kiosk when appellant approached. Appellant said his

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[1] Undesignated statutory references are to the Penal Code.

backpack, which he had left in a far corner of the garage, was missing. He asked Stephanian if he had taken the backpack and demanded its return. When Stephanian told appellant he had not seen the backpack, appellant became angry and kicked the kiosk. Stephanian told appellant he was not the person who parked the cars, and pointed to the valet for Morton's Steakhouse across the street.

Appellant walked to the Morton's valet station and returned to Stephanian's kiosk holding a knife at his side pointed toward the ground. Appellant again demanded that Stephanian return his backpack to him. Stephanian retreated into his booth and told appellant he did not have the backpack. Appellant then ran across the street to the Morton's valet stand, whereupon Stephanian locked himself inside the kiosk and called the police.

At the valet station, appellant angrily confronted the valet, Romeo Vargas, and another Morton's employee, Armondo Alvarez, about the backpack. Neither had seen it. Appellant pulled out a knife and made three or four stabbing motions toward Vargas's chest. Vargas raised his hands to protect himself, and the knife cut one of his hands. Alvarez picked up a folding chair and tried to swing it at appellant. Appellant grabbed Alvarez, and the two men fell to the ground. After security guards broke up the fight, police arrived and arrested appellant.

DISCUSSION

I. The Trial Court Did Not Abuse Its Discretion

A. *Relevant background*

At the sentencing hearing, defense counsel requested that the trial court exercise its discretion under section 17, subdivision (b) to reduce appellant's felony conviction for assault with a deadly weapon to a misdemeanor. In support of the request,

counsel cited appellant's lack of a prior criminal history and the facts of the current offense: the fact that appellant committed the offense on the mistaken belief that his backpack had been stolen and the absence of any serious injury in a confrontation involving two men against appellant. As an alternative to reducing the offense to a misdemeanor, defense counsel requested that the court impose a probationary sentence.

The trial court declined to exercise its discretion to reduce the felony to a misdemeanor, but placed appellant on felony formal probation for three years, with the condition that appellant serve two days in county jail. Noting that it was taking a chance on appellant, the court stated it expected him to be a successful probationer and encouraged appellant to comply with the terms of probation and then seek a reduction of the conviction to a misdemeanor.

B. *Relevant legal principles*

Most crimes are classified as *either* felonies or misdemeanors, according to the explicit label or the prescribed punishment. (*People v. Park* (2013) 56 Cal.4th 782, 789.) So-called wobblers, however, fall into a special class of crimes involving conduct that varies widely in its level of seriousness, and may be charged, or in the discretion of the court, punished as a felony *or* a misdemeanor. (*Ibid.*; *People v. Feyrer* (2010) 48 Cal.4th 426, 433, fn. 4.) Assault with a deadly weapon is a wobbler (*Park*, *supra*, 56 Cal.4th at p. 790), and where a defendant stands convicted of this offense, the trial court has discretion to reduce the felony to a misdemeanor " 'either by declaring the crime a misdemeanor at the time probation is granted or at a later time—for example, when the defendant has successfully completed probation' " (*People v. Tran* (2015) 242 Cal.App.4th 877, 885, quoting *Park, supra*, at p. 793).

We review the trial court's exercise of discretion in denying a request to reduce a wobbler to a misdemeanor for abuse of discretion. (*People v. Medina* (2018) 24 Cal.App.5th 61, 65.) We will not substitute our judgment for the judgment of the trial court, nor will we reverse a decision simply because reasonable people might disagree. (*People v. Superior Court* (*Alvarez*) (1997) 14 Cal.4th 968, 978.) It is the burden of the party challenging the sentence on appeal to establish that the trial court's sentencing decision was irrational or arbitrary. " 'In the absence of such a showing, the trial court is presumed to have acted to achieve legitimate sentencing objectives, and its discretionary determination to impose a particular sentence will not be set aside on review.' " (*Id.* at pp. 977–978.)

" 'Probation is a form of leniency which is predicated on the notion that a defendant, by proving his ability to comply with the requirements of the law and certain special conditions imposed upon him, may avoid the more severe sanctions justified by his criminal behavior.' " (*People v. Arnold* (2004) 33 Cal.4th 294, 303.) "A trial court that grants probation upon a defendant's conviction of a wobbler offense is assumed to have acted 'with discriminating appreciation of the effect of the form of [the court's] order upon defendant's activities and status,' having in mind the rule that the charge remains a felony until a contrary pronouncement of judgment occurs. [Citation.] . . . 'Thus, when [the court] suspends pronouncement of sentence for an alternatively punishable offense, it is to be assumed that while [the court] did not wish to deprive the defendant of his [or her] civil rights and thereby unnecessarily hamper defendant's efforts to rehabilitate himself [or herself] (by stigmatizing him [or her] even temporarily as one against whom a judgment of conviction of felony and sentence to prison had been entered) the [court] also

did not wish to classify the defendant as a mere mis[de]meanant whose offense would not be available, for example, to increase defendant's punishment if defendant should thereafter prove himself [or herself] a recidivist.' [Citation.] When probation is granted without imposition of a sentence, a defendant remains under the jurisdiction of the court 'not only in relation to his [or her] probationary status but also in relation to the character of the offense of which he [or she] has been convicted.' " (*People v. Feyrer*, *supra*, 48 Cal.4th at p. 439; *People v. Tran*, *supra*, 242 Cal.App.4th at p. 890.)

C. *The trial court's ruling was neither irrational nor arbitrary*

Appellant maintains that the trial court's denial of his request to reduce his felony conviction to a misdemeanor was arbitrary and thus constituted an abuse of discretion. In so arguing, appellant asserts that the court's denial of his request was inconsistent with the multiple mitigating factors cited by the court in imposing a probationary sentence with minimal jail time. But such mitigating circumstances—including the significance of appellant's missing backpack, his lack of a criminal record, his "semi-homeless" situation, and his supportive family—do not establish he was entitled to reduction to a misdemeanor as a matter of law. Rather, the court's careful consideration of the mitigating factors in appellant's case explains the lenience the court exercised by placing him on probation, even though his use of a deadly weapon made him presumptively ineligible for such leniency absent unusual circumstances. (§ 1203, subd. (e)(2) ["Except in unusual cases where the interests of justice would best be served if the person is granted probation, probation shall not be granted to any of the following persons: [¶] . . . [¶] . . . Any person who used, or attempted to use, a deadly weapon upon

a human being in connection with the perpetration of the crime of which he or she has been convicted"].)

The trial court showed considerable insight and compassion in recognizing the circumstances that led appellant to commit this crime. It also appreciated the risk it was taking by handing down such a light punishment. To balance that risk, the court rationally maintained the felony status of the conviction while inviting appellant to seek a reduction to a misdemeanor in the future after he had complied with the terms of his probation. In so doing, the trial court did not abuse its discretion.

II. The Sentencing Minute Order Must Be Corrected to Conform to the Court's Oral Pronouncement of Judgment

The minute order from the sentencing hearing in this case states that the trial court imposed a victim restitution fine (§ 1202.4, subd. (b)), a probation revocation fine (§ 1202.44), a $40 court security assessment (§ 1465.8, subd. (a)(1)), and a $30.00 criminal conviction assessment (Gov. Code, § 70373). In fact, the trial court did not impose any of these fines and assessments. With respect to the victim restitution and probation revocation fines reflected in the minute order, the parties assert, and we agree that when a discrepancy between the oral proceedings and the court's minute order exists, the oral pronouncement of the court controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185; *People v. Zachery* (2007) 147 Cal.App.4th 380, 387–388.) Further, although the trial court should have stated a reason for the omission of the fines and assessments, the court's failure to do so was not raised below. Accordingly, the error cannot be raised for the first time on appeal (*People v. Tillman* (2000) 22 Cal.4th 300, 302–303), and the minute order must be corrected to conform to

the oral pronouncement of the trial court's judgment (*People v. Andrade* (2015) 238 Cal.App.4th 1274, 1311).

The same reasoning applies with respect to the court security and criminal conviction assessments reflected in the minute order but not ordered by the trial court. The People assert, however, that the trial court's failure to impose these mandatory assessments resulted in an unauthorized sentence that must be corrected on appeal. We disagree.

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157, 1164, 1168, our colleagues in Division Seven held that due process under both the United States Constitution (U.S. Const., 14th Amend.) and the California Constitution (Cal. Const., art. I, § 7) "requires the trial court to conduct an ability to pay hearing and ascertain a defendant's present ability to pay before it imposes court facilities and court operations assessments under Penal Code section 1465.8 and Government Code section 70373." (*Dueñas*, at p. 1164.) In the wake of *Dueñas*, these assessments can no longer be considered mandatory because a court may refrain from imposing them based on its determination that the defendant lacks the ability to pay. Accordingly, the People's failure to object to the trial court's omission of the assessments forfeits respondent's challenge to this sentencing error on appeal. (*People v. Frandsen* (Apr. 4, 2019, B280329) ___ Cal.App.5th ___ [2019 Cal.App. Lexis 309]; see *People v. Tillman*, *supra*, 22 Cal.4th at pp. 302–303.)

The March 5, 2018 minute order must be corrected, and the court security and criminal conviction assessments as well as the victim restitution and probation revocation fines reflected therein must be stricken to conform with the trial court's oral pronouncement of judgment.

DISPOSITION

The matter is remanded to the trial court with directions to conform the sentencing minute order to the trial court's oral pronouncement of judgment, by striking the following provisions: (1) all references to payment of a restitution fine in the amount of $400.00 pursuant to Penal Code section 1202.4, subdivision (b); (2) all references to payment of a probation revocation restitution fine in the amount of $400.00 pursuant to Penal Code section 1202.44; (3) imposition of a $40.00 court security assessment under Penal Code section 1465.8, subdivision (a)(1); and (4) imposition of a $30.00 criminal conviction assessment pursuant to Government Code section 70373. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

LUI, P. J.

We concur:

CHAVEZ, J.

HOFFSTADT, J.